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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE THE APPLICATION OF:
Inventor : Mitchell R. Swartz

Serial no. 09/ 750, 480

Filed: 12/28/00
For: **METHOD AND APPARATUS TO MONITOR LOADING USING VIBRATION**

This is a continuation of Serial no. 07/ 371,937
Filed: 06/27/89

PAPER: 6 (Applicant's Count)
Group Art Unit: 3641

Examiner: Behrend, H.

February 12, 2002

Commissioner of Patents and Trademarks
Washington, D.C. 20231

PETITION TO THE COMMISSIONER PURSUANT TO 37 C.F.R. 1.181

1. This Petition is made pursuant to 37 C.F.R. 1.181 to the Commissioner of Patents, and is made to invoke his supervisory authority to correct the situation with respect to the recent unsigned unnumbered Office Notice [Exhibit "A" attached, as described below]. Pursuant to 37 C.F.R. 1.181, there is no fee. This Petition is reasonable based upon the reasons stated below and confirmed by the facts as discussed in the Declaration supporting this Petition.

2. In the discussion below, reference is made to Declaration of Dr. Mitchell Swartz (hereinafter called the "Swartz Declaration") dated January 22, 2002.

3. This motion is reasonable because of Mr. Behrend's systematic incorrect statements, his failure to abide by the record, his profound bias, and his repeated attempts to coerce double-patenting. This Petition also is filed as a Motion to recuse Mr. Harvey Behrend from participating directly or indirectly in Applicant's patent application to avoid the appearance of impropriety.

MR. BEHREND FAILED TO RESPOND TO APPLICANT

4. In the communication from the Applicant, dated May 31, 2001, Applicant has shown the election of species requirements set forth on pages 2-3 of the 5/7/01 Office action, to be improper or in error -- especially when viewed in the light of the original application and the Office's previous demands on the Applicant. The Examiner has not responded to what Applicant said, that the original specification, claims and drawings of Serial no. 07/371,937 have already gone through a restriction by the Primary Examiner Daniel Wasil on September 16, 1991.

5. Second, the Examiner has also ignored what Applicant said regarding the fact that the Examiner's re-restriction is not proper in light of 37 CFR 1.142 because the Examiner has not explained why, given Examiner Wasil's previous restriction, the latest restriction can support separate patents which are independent [37 CFR §1.142, (MPEP §806.04 - §806.04(j))] and [37 CFR §1.142]/or [MPEP §806.05 - §806.05(i))] distinct.

6. Third, the Examiner has also ignored that the Applicant has cited that the Examiner's re-restriction is improper because as the Court has found:
"Respondents' claims must be considered as a whole, it being inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis." [Diamond v. Diehr, 450 U.S. 175 (1981), 450 U.S. 175, No. 79-1112, 3/3/81]

7. Fourth, the Examiner has also ignored that the Applicant has cited and notified the Examiner that he is attempting to coerce the Applicant into double patenting.

8. Fifth, the Examiner has also ignored that the Applicant has noted that the Examiner's demand is not proper in light of MPEP §808 because given Examiner Wasil's previous restriction, Mr. Behrend has not given any substantive foundation for his re-restriction.

9. Therefore, Applicant has stated at least five (5) reasons why the requirement should be withdrawn or modified. Applicant has pointed out errors in the Examiner's action. Not one of these issues has been responded to by the Examiner, despite the fact that there was Obligation on the part of the Examiner to respond, because Applicant satisfied his burden by citing the above issues.

Mr. Behrend is Obligated to have communications consistent with the pleadings in the Office including past unrebutted Declarations [*In re Gazave*, 379 F.2d 973, 978, 154 USPQ 92, 96 (CCPA 1967); *In re Chilowsky*, 229 F.2d 457, 462, 108 USPQ 321, 325 (CCPA 1956); *In re Jolles*, 628 F.2d 1322, 206 USPQ 885 (CCPA 1980)] but he has not. Despite clear and definitive work in these matters by Mr. Daniel Wasil and others, Mr. Behrend is determined to concoct things, including issues and matters which already have been settled by the Federal Appeals Court after great cost and effort. Despite orders from the Court on how to handle this, Mr. Behrend, with his now continuous attempt to ignore both the record and responsibility, has elected to demonstrate more than an appearance of impropriety. Against the public good, Mr. Behrend although Obligated to deal with the application and claims, has attempted to lead away from the invention, consistent with his systematic attempts to coerce the applicant into improper actions involving double-patenting.

10. This behavior by Mr. Behrend is astonishing given that Mr. Behrend has "taken" all of Applicant's applications in what appears to be retaliation for a Federal lawsuit the applicant lodged against the Commissioner of Patents.

11. This systematic behavior creates an appearance of unfairness by the Office, because in the above-entitled action, and at least three other of Applicant's applications, taken by Mr. Behrend, he has demonstrated a lack of concern for the record, rules, or guidelines.

Most egregious, on information and belief, Examiner Behrend has stated that he will never allow a patent involving the cold fusion field to issue.

MR. BEHREND CONTINUES ATTEMPTING TO COERCE DOUBLE PATENTING

12. Mr. Behrend, in several of his communications is coercing the Applicant into double patenting for reasons not clear. In the present Application, "Method And Apparatus To Monitor Loading Using Vibration" [Serial no. 09/ 750, 480, Filed: 12/28/00; continuation of Serial no. 07/ 371,937, Filed: 06/27/89], Mr. Behrend in his

Communication #5, mailed 2/12/01 has attempted to force the Applicant to double patent. Mr. Behrend's request for a new second "first-restriction" was neither necessary nor proper for several reasons.

A. In "Systems To Monitor And Accelerate Fusion Reactions In A Material Using Electric And Magnetic Fields" [Serial no. 09/568,728, Filed: 05/11/2000; a division of Serial no. 07/ 371,937, Filed: 06/27/89], Mr. Behrend in his Communication #4, mailed 10/11/01, attempted to force the Applicant to double patent, by his unsupported demand for a new second "first-restriction". Said attempt was neither necessary nor proper in light of the original application because the original application was restricted already. The Primary Examiner Daniel Wasil separated 07/371,937 into three inventions [September 16, 1991]. For the convenience of Mr. Behrend, a copy of this relevant first restriction by Examiner Wasil was sent to him, and thereafter he apparently ignored it.

B. In "Method And Apparatus To Integrate Reactors Involving Reactions Within A Material" [Serial no. 09/ 573,381, Filed: 05/19/2000, a division of Serial no. 07/ 760,970, Filed: 09/17/1991], Mr. Behrend in his Communication #5, mailed 2/12/01, attempted to force the Applicant to double patent by his unsupported demand for a new second "first-restriction". Said attempt was neither necessary nor proper in light of the original application because the original application was restricted already. The original specification, claims and drawings of Serial no. 07/760,970 have already gone through a restriction by the Primary Examiner Daniel Wasil on June 8, 1992. Mr. Wasil separated 07/760,970 into five inventions. For the convenience of Mr. Behrend, a copy of this relevant first restriction by Examiner Wasil was sent to him, and thereafter he apparently ignored it.

C. In "Method And Apparatus To Control Isotopic Fuel Loaded Within A Material" [Serial no. 09/ 750,765, Filed: 12/28/00; a continuation of Serial no. 07/ 760,970, Filed: 09/17/1991], Mr. Behrend in his Communication #2, mailed 5/7/01 has attempted to force the Applicant to double patent. Mr. Behrend's request for a new second "first-restriction" was neither necessary nor proper for several reasons. The original specification, claims and drawings of Serial no. 07/760,970 have already gone through a restriction by the Primary Examiner Daniel Wasil on June 8, 1992. Mr. Wasil separated 07/760,970 into five inventions. For the convenience of Mr. Behrend, a copy of this relevant first restriction by Examiner Wasil was sent to him, and thereafter he apparently ignored it.

MR. BEHREND CONTINUES TO REFUSE TO PERSONALLY SIGN HIS DOCUMENTS

13. Although Examiner Wasil and other Examiners have personally signed the documents when the first restrictions were made, by contrast Mr. Behrend does not personally sign the documents in which he makes improper demands for double patenting. This omission by Mr. Behrend is a violation of 803.01.

"Since requirements for restriction under Title 35 U.S.C. 121 are discretionary with the Commissioner, it becomes very important that the practice under this section be carefully administered. Notwithstanding the fact that this section of the statute apparently protects the applicant against the dangers that previously might have resulted from compliance with an improper requirement for restriction, it still remains important from the standpoint of the public interest that no requirements be made which might result in the issuance of two patents for the same invention. Therefore, to guard against this possibility, the primary examiner must personally review and sign all final requirements for restriction."

[803.01, Review by Primary Examiner]

In the present application [Serial no. 09/568,728, Filed: 05/11/2000; a divisional of Serial no. 07/ 371,937, Filed: 06/27/89], Mr. Behrend, in his Communication #6 with such restriction, did not sign the document.

A. Similarly, in "Method And Apparatus To Monitor Loading Using Vibration" [Serial no. 09/ 750, 480, Filed: 12/28/00; continuation of Serial no. 07/ 371,937, Filed: 06/27/89], Mr. Behrend in his Communication #2, with such restriction did not sign the document.

C. In "Method And Apparatus To Control Isotopic Fuel Loaded Within A Material" [Serial no. 09/ 750,765, Filed: 12/28/00; a continuation of Serial no. 07/ 760,970, Filed: 09/17/1991], Mr. Behrend in his Communication #2, with such restriction did not sign the document.

D. In "Method And Apparatus To Integrate Reactors Involving Reactions Within A Material" [Serial no. 09/ 573,381, Filed: 05/19/2000; a continuation of Serial no. 07/ 760,970, Filed: 09/17/1991], Mr. Behrend in his Communication #7, with such restriction did not sign the document.

MR. BEHREND HAS IGNORED REQUESTS FOR CONSTRUCTIVE CRITICISM

14. Mr. Behrend has ignored each and every of Applicant's requests for constructive assistance and suggestions in drafting one or more acceptable claims [pursuant to MPEP 707.07(j)] and in making constructive suggestions [pursuant to MPEP 706.03(d)] in each and every case he has "taken". All requests have been ignored. Mr. Behrend, by continuing this behavior, is at odds with law and Guidelines, and has even deviated from the Code of Federal Regulations at Title 37, The Patent And Trademark Office Code Of Professional Responsibility by his systematic ignoring

of the record. Mr. Behrend's actions, by systematically ignoring the record and other harassment, are violations of Canon 9 10.110.

15. Applicant requested constructive assistance and suggestions from the Examiner in drafting one or more acceptable claims [pursuant to MPEP 707.07(j)] and in making constructive suggestions [pursuant to MPEP 706.03(d)] on 1/31/01. The Examiner has not complied. Applicant again respectfully requests constructive assistance and suggestions from the Examiner in drafting one or more acceptable claims [pursuant to MPEP 707.07(j)] and in making constructive suggestions [pursuant to MPEP 706.03(d)].

16. The U.S. Supreme Court has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)]. In the present application, the Examiner appears to be attempting to coerce double patenting despite a record at the Office and said Honorable Court. Attention of the Office and Court is directed to the fact that this has continued even after Applicant cited violations by the Examiner in this matter of MPEP §808, 37 CFR 1.142, and Diamond v. Diehr [450 U.S. 175 (1981); 450 U.S. 175, No. 79-1112, 3/3/81] on 1/31/01.

17. The Applicant of the above-entitled application continues to preserve all rights granted by the U.S. Constitution and legislated by the U.S. Congress to continue the prosecution of the above-entitled application.

18. If the Commissioner is fair and is committed to honesty, and fairness, and national security, and the US Constitution as are other Americans, he will rein in Mr. Behrend, and stop this blantant systematic discrimination against the Applicant.

Wherefore, Applicant requests the Commissioner invoke his inherent supervisory power to correct these matters and to recuse Mr. Harvey Behrend from all participation in examination of Applicant's file folder both directly and indirectly, and consider returning Mr. Wasil, or some other serious and unbiased Examiner to the above-entitled case.

Respectfully,

Mitchell R. Swartz, ScD, MD, EE
Post Office Box 81135
Wellesley Hills, Mass. 02481

UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
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Washington, D.C. 20231
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/750,480	12/28/2000	Mitchell R. Swartz	COPY OF PAPERS ORIGINALLY FILED	7970

7590 01/16/2002

Mitchell R. Swartz, ScD, EE, MD
16 Pembroke Road
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EXAMINER
BEHREND, HARVEY E

ART UNIT	PAPER NUMBER
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DATE MAILED: 01/16/2002

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PATENT & TRADEMARK OFFICE

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Paper No.

Notice of Non-Compliant Amendment (37 CFR 1.121)

The amendment filed on 6/4/01 is considered non-compliant because it has failed ot meet the requirements of 37 CFR 1.121, as amended on September 8, 2000 (see *65 Fed. Reg. 54603*, Sept. 8, 2000, and *1238 O.G. 77*, Sept. 19, 2000). In order for the amendment to be compliant, applicant must supply the following omissions or corrections in response to this notice.

THE FOLLOWING ITEMS ARE REQUIRED FOR COMPLIANCE WITH RULE 1.121 (APPLICANT NEED NOT RE-SUBMIT THE ENTIRE AMENDMENT):

☐ 1. A clean version of the replacement paragraph(s)/section(s) is required. See 37 CFR 1.121(b)(1)(ii).

☐ 2. A marked up version of the replacement paragraph(s) is requrired. See 37 CFR 1.121(b)(1)(iii).

☐ 3. A clean version of the amended claim(s) is required. See 37 CFR 1.121(c)(1)(i).

☐ 4. A marked up version of the amended claim(s) is requrired. See 37 CFR 1.121(c)(1)(ii).

Explanation: _____

(LIE: Please provide specific details for correction to assist the applicant. For example, "the clean version of claim 6 is missing.").

For further explanation of the amendment format required by 37 FR 1.121, see MOEP § 714 and the USPTO website at http://www.uspto.gov/web/offices/dcom/olia/pbg/sampleaf.pdf. **A condensed version of a sample amendment format is attached.**

☐ **PRELIMINARY AMENDMENT:** Unless applicant **supplies the omission or correction** to the preliminary amendment in compliance with revised 37 CFR 1.121 noted above within ONE MONTH of the mail date of this letter, examination on the merits may commence without entry of the originally proposed preliminary amendment. This notice is not an action under 35 U.S.C. 132, and this ONE MONTH time limit is not extendable.

☐ **AMENDMENT AFTER NON-FINAL ACTION:** Since the above mentioned reply appears to be *bona fide*, applicants is given a TIME PERIOD of ONE MONTH or THIRTY DAYS from the mailing of this notice, whichever is longer, within which to **supply the omission or correction noted above** in order to **avoid abandonment.** EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136(a).

Mary Hellner

Legal Instruments Examiner(LIE)

Applicant has not shown the election of species requirements set forth on pages 2-3 of the 5/7/01 Office action, to be improper or in error.

It would represent a serious burden on the examiner to search and examine claims to each of the species referred to each of the groupings in sections 2-5 of the 5/7/01 Office action as evidenced for example just by the widely varying systems/structures illustrated in the different figures in the drawings.

See 37 CFR 1.111. Since the above-mentioned reply appears to be *bona fide*, applicant is given **ONE (1) MONTH or THIRTY (30) DAYS** from the mailing date of this notice, whichever is longer, within which to supply the omission or correction in order to avoid abandonment. EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136(a).

Any inquiry concerning this communication should be directed to Mr. Behrend at telephone number (703) 305-1831.

Behrend/cw
October 30, 2001

HARVEY E. BEHREND
PRIMARY EXAMINER